SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 588

PERRY ZIMMERMAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK and EDWARD F. KENNELLY, SUPERINTENDENT OF SCHOOLS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Perry Zimmerman, petitions for a Writ of Certiorari to review the final judgment of the New Jersey Supreme Court which affirmed the previously rendered decisions of the State Commissioner of Education and State Board of Education which granted to the petitioner back pay for a one-month period but failed to reinstate the petitioner to his position as a teacher in the Public School system of the City of Newark.

Opinions Below.

The majority and concurring opinions of the New Jersey Supreme Court are reported at 38 N. J. 65, 183 A. 2d 25 (1962). A previous decision of the New Jersey Supreme Court in which petitioner was an appellant is reported in the matter of *Laba* v. *The Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957). The opinion of the State Board of Education and the State Commissioner of Education are not officially reported. (Appendix, infra, pp. 16 to 29).

Jurisdiction.

The final judgment of the New Jersey Supreme Court was entered on June 29, 1962. The time within which a petition for a writ of certiorari may be filed with this Court was extended by Order of this Court to November 11, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1257 (3).

Questions Presented.

1. Is it a violation of the due process clause of the Fourteenth Amendment and an abrogation of petitioner's rights under the First Amendment of the United States Constitution for a state to dismiss a public school teacher and deprive him from obtaining tenure simply and as a direct result of his refusal to answer questions asked by a Congressional Sub-Committee about his membership in the Communist Party where such asso-

ciation was lawful at the time it was alleged to exist and where no hearing on the question of the teacher's loyalty is accorded to him.

2. Whether the State of New Jersey unconstitutionally, arbitrarily, unreasonably and in violation of the rulings of this Court, unduly deprived petitioner of his rights to invoke the privileges of the Fifth Amendment, to associational privacy, to academic freedom, and to First Amendment freedoms, all in violation of the due process clause of the Fourteenth Amendment.

3. Did the petitioner obtain academic tenure by virtue and as a result of the actions undertaken by the State and did the State arbitrarily and unreasonably dismiss the petitioner without a hearing in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Statutes and Constitutional Amendments Involved.

United States Constitution.

Amendment (I)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land

or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment (XIV)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New Jersey Statutes.

18:13-16. *Tenure of teachers, principals and superintendents and assistants.*

The services of all teachers, principals, superintendents and assistant superintendents, of the public schools, excepting those who are not the holders of proper teachers' certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of three consecutive calendar years in that district unless shorter period is fixed by the employing board, or (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years, some

part of which must be served in an academic year after July first, one thousand nine hundred and forty; provided, that the time any teacher, principal or supervising principal had taught in the district in which he was employed at the end of the academic year immediately preceding July first, one thousand nine hundred and forty, shall be counted in determining such period or periods of employment in that district.

An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation. As Amended L. 1940, c. 43, p. 125, § 1; L. 1952, c. 236, p. 796, § 12.

Statement of the Case.

The petitioner is a school teacher. He was employed by the Board of Education of the City of Newark, New Jersey, on July 30, 1952. He commenced his teaching duties on September 1, 1952, and his contract was renewed in 1953 and 1954. During the period 1946 to 1948, the petitioner was a member of the Communist Party. When the petitioner commenced his employment with the City of Newark, he had been an ex-communist for four years. On May 19, 1955, this teacher was subpoenaed to appear before a Sub-committee of the House Un-American Activities Committee sitting in Newark, New Jersey. Upon advice of counsel, petitioner refused to answer questions asked by the Sub-committee pertaining to his membership in the Communist Party. His refusal was based upon the Fifth Amendment's protection against incrimination. As a result of the exercise of his constitutional rights before the Sub-committee on May 19, 1955, the next day, on May 20, 1955, this teacher was summarily suspended by the Newark

Superintendent of Schools. On May 23, 1955, the Superintendent of Schools of the City of Newark filed charges against petitioner with the Newark Board of Education which in substance alleged that petitioner's conduct and testimony at the Sub-committee hearing rendered him guilty of conduct unbecoming a teacher, affected his capacity to perform his duties and constituted just cause for dismissal. After his appearance before the Newark Board of Education on June 21, 1955, the Board on June 28, 1955 dismissed petitioner effective as of May 19, 1955. The Board sustained the charges as submitted by the Superintendent. The sole reason for the discharge of petitioner was the fact that he invoked his rights under the Fifth Amendment in response to questions presented to him by the Sub-committee of the House Un-American Activities Committee.

Upon appeal from the decision of the Board to the Supreme Court of New Jersey, the actions of the Board were condemned and the matter was remanded on February 4, 1957, for hearings in accordance with the court's mandates. *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957). The basis for the reversal was this court's decision in *Slochower* v. *Board of Higher Education of City of New York*, 350 U. S. 551 (1956). On March 20, 1957, the Newark Board of Education directed the Superintendent of Schools to conduct an inquiry and report to the Newark Board of Education the results of such inquiry, "to the end that the Board may then make such further inquiry and take such further action as the facts and circumstances warrant."

On May 16, 1957, petitioner appeared with counsel before the Superintendent of Schools in Newark. Petitioner

answered all questions as fully as possible. The Superintendent during the inquiry manifested general satisfaction with his responses. Nevertheless, on October 22, 1957, the Superintendent filed supplementary charges against petitioner with the Newark Board of Education charging, for the first time, that Perry Zimmerman failed to cooperate at the interview conducted on May 16, 1957, and failed to give frank and full answers.

The interview, which took place on May 16, 1957, lasted two hours and twenty-five minutes. Petitioner actually did answer each and every question at length. He admitted membership in the Communist Party from 1946 to late in 1948 and testified as to his reasons for joining and leaving the Party. Chief Justice Weintraub, in his concurring opinion rendered in this cause, stated: "He (petitioner) answered *every question* put to him. Nonetheless, the Superintendent made no finding upon the *target issue* of present loyalty. Nor did the Superintendent find (and he could not) that Zimmerman *refused to answer* any question * * *" (38 N. J. at 82).

A further hearing was conducted by the Newark Board of Education from November 4, 1957, to December 18, 1957. This hearing was based, not upon the original charges but solely upon the Supplemental Charges filed by the Superintendent. In support of these charges, the transcript of the Superintendent's interview, dated May 16, 1957, was introduced in evidence. At this Board hearing, the petitioner's principal testified that he had rated petitioner as "satisfactory" and that tenure would follow from said rating as a matter of course. Tenure arises wherein a probationary teacher signs a fourth contract with the same school system

and teaches one day under said fourth contract. On June 24, 1958, the Newark Board of Education adopted a resolution dismissing petitioner effective as of May 20, 1955, for his failure to cooperate with the Superintendent and with the Board. As to the allegation of his failure to cooperate with the Board no charges were ever made, presented and heard charging petitioner with such failure to cooperate.

An appeal was taken by the petitioner to the State Commissioner of Education. On November 9, 1960, the Commissioner held that the dismissal by the Board of Education of petitioner effective as of May 20, 1955, was invalid because the Board's dismissal reverted to a time prior to the acts justifying it. Petitioner was awarded back pay from May 20, 1955, to June 30, 1955. However, as to Zimmerman's continued employment, the Commissioner refused to reinstate him because he had not acquired tenure. The decision states:

> "If injustice occurs to a teacher because litigation interrupts the continuity of the employment essential to the acquisition of tenure, the remedy must lie with the legislature."

The Commissioner expressed no opinion as to the merits of the case but stated that he could not grant the relief requested to wit, reinstatement and reemployment, because he had not acquired tenure. The State Board of Education affirmed the decision of the State Commissioner of Education. Upon further appeal, the matter came before the New Jersey Supreme Court, which affirmed the decisions of the State Commissioner of Education and the State Board of Education. Three concurring opinions were filed by justices of the New Jersey Supreme Court.

Reasons for Granting the Writ.

I. The questions presented are substantial.

This case presents important questions involving the protection of an individual's rights to personal, associational and academic freedom and liberty as protected by the Due Process clause of the Fourteenth Amendment and the right of every citizen to exercise those constitutional protections encompassed in the Fifth Amendment. As the constitutional guardian of these liberties, this Court is requested to review the petitioner's despairing pursuit of these goals. Despite continuous litigation during the past six years, the petitioner has been unsuccessful in his attempt to remove the stigma of this suspension and ultimate discharge. The petitioner was summarily discharged from his position as a teacher as of May 20, 1955, as the direct and sole result of his having "pleaded the Fifth Amendment" before a Congressional Sub-committee.

The petitioner's work and performance as a teacher was satisfactory and, *but* for his exercise of his constitutional rights under the Fifth Amendment before a Sub-committee of the House Un-American Activities Committee on May 19, 1955, petitioner would have attained academic tenure in accordance with the laws of New Jersey. This fact cannot be ignored nor severed from the proceedings which followed. The State Commissioner of Education's opinion clearly reflects the denial of petitioner's constitutional rights. The State Commissioner of Education was seeking an easy way out, and in doing so, his decision rendered, proceeding on the basis of lack of tenure, clearly reflects the denial of petitioner's constitutional rights. But the

reason, and the only reason, why petitioner was suspended was his exercise of his constitutional rights, and the failure of the school board to renew petitioner's contract is attributable solely to his suspension. This suspension was declared invalid in *Laba* v. *Newark Board of Education, supra.*

The record explicitly reveals that petitioner's suspension was a direct result of his exercise of his constitutional rights. There never has been a determination whether his contract should or should not have been renewed and therefore these constitutional rights will continue in the future to be impaired. The foregoing is evident by virtue of the decision of the Newark Board of Education rendered on June 24, 1958, which dismissed petitioner retroactively as of May 20, 1955, for subsequent acts allegedly committed on May 16, 1957, and November 14, 1957. The fact that the Newark Board of Education made petitioner's discharge retroactive to the day after petitioner exercised his constitutional rights is mute evidence of the reasoning and intent of that body. In *Beilan* v. *Board of Education,* 357 U. S. 399 (1958), the petitioner was suspended five days after his refusal to answer questions before the House Sub-committee. This was thirteen months after he had refused to answer the same questions before the School Superintendent but was permitted to teach during this thirteen-month interim period. Mr. Chief Justice Warren commented that the actions of the petitioner before the House Sub-committee were "inextricably involved in the Board's decision to discharge him" and "that the validity of the Board's action cannot be sustained without consideration of this ground." If the conclusion of guilt *may* "rest on a constitutionally impermissible basis, the adjudication

must be set aside, notwithstanding a state court's conclusion that permissible bases existed on which the decision might have rested." (357 U. S. at 412).

The foregoing issues are important in the development of the law pertaining to the constitutional limitations upon the rights of states to discharge their employees.

The questions are important to teacher's tenure, an essential part of democratic education and the continued existence of academic freedom.

This case is important because it presents the problem of whether the State may extinguish these rights by a subterfuge as blatant as this one.

The importance of these issues to our democratic society and its system of public education is highlighted by the necessity of the Supreme Court of New Jersey to render three concurring opinions in this case.

For these reasons, and additionally the fact that the House Sub-committee continues to subpoena teachers before it and State Boards of Education continue to discharge teachers for exercising their constitutional rights before such House Sub-committee, the review of this case is important.

II. The New Jersey decision is not in accord with the prior rulings of this Court.

The opinion of the New Jersey Supreme Court together with its three concurring opinions and the opinions of the State Commissioner and the State Board of Education reveal that this school teacher was dismissed because he was a former member of the Communist Party, the protesta-

tions of the Board of Education to the contrary notwithstanding.

The actions by the School Board and the State Commissioner were an obvious attempt to bypass this Court's opinion in *Slochower* v. *Board of Higher Education of City of New York*, 350 U. S. 551 (1956). The petitioner was never afforded a hearing on the original charges as drafted by the Superintendent of Schools in 1955; nor was the petitioner afforded a hearing within the terms of the mandate of the New Jersey Supreme Court issued on February 4, 1957, as rendered in *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957), in which petitioner was an appellant; nor was the petitioner ever afforded a hearing as to tenure; nor a hearing as to his alleged non-cooperation with the Newark Board of Education. The right to refuse, when interrogated by a Congressional Committee, to answer self-incriminating questions is guaranteed by the Fifth Amendment to the United States Constitution. *Adams* v. *Maryland*, 347 U. S. 179 (1954). The decision by this Court in *Slochower* requires that a teacher be given and is entitled to receive a fair hearing by the educational institution concerning his testimony before the Congressional Committee. Furthermore, the State cannot require, as a condition of exercising that right, that he surrender his means of livelihood. Such a course of action by the State is a denial of the right. The important questions here presented are an attempt to erode the foregoing doctrines. The petitioner was never granted such a hearing.

Despite this Court's decision in *Slochower* and the mandate in *Laba* by the New Jersey Supreme Court, the State Commissioner utilized a not too subtle technique to avoid

the consequences of *Slochower*. This conclusion is substantiated by the concurring opinion of the Chief Justice of the New Jersey Supreme Court wherein he agrees that the purported proceedings did not conform with the mandate of that Court, did not afford petitioner a fair hearing, and that no findings were made as to the petitioner's loyalty or his willful refusal to testify. A governmental agency should not be allowed to cut corners to reach a desired result.

The Newark Board of Education did not render any findings as to petitioner's loyalty nor did petitioner refuse to answer any question propounded by the Superintendent of Schools or the Newark Board of Education. The Chief Justice of the New Jersey Supreme Court said in this regard:

> "I believe the Board, taking into account the climate of the times and the fears, however unwarranted, of the parents of students, could conclude it is the course of prudent management to employ someone else. That, it seems to me, was the decision the Board made." (38 N. J. at 81).

This climate permeated the entire procedure followed throughout this case. This court has consistently held that a public employee cannot be arbitrarily discharged or refused continued employment because the public employee exercised his constitutional rights under the Fifth Amendment.

The proceedings and decisions in this case are also in derogation of this court's opinions in *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959); *Nelson* v. *Los Angeles County*, 362 U. S. 1 (1960) and *Lerner* v. *Casey*, 357 U. S. 468 (1958).

Vitarelli involved the employment rights of a governmental employee who could have been summarily discharged at any time without the giving of a reason. This Court concluded that where the Secretary gratuitously decided to give a reason and that reason was national security, he was obligated to conform to certain procedural standards prior to dismissal. This Court ordered reinstatement despite an attempt by the Secretary, during the course of the proceedings, to discharge the employee without setting forth reasons. In *Nelson*, this Court granted review to consider whether a temporary employee, who could be summarily discharged, should be reinstated where his discharge was arbitrary and unreasonable by virtue of his invocation of his rights before a Congressional Sub-committee. These decisions are a clear recognition of the doctrine that even a probationary employee has constitutional rights which this Court will protect. If a state or one of its agencies discharges or refuses to reinstate a non-tenure employee and gives a reason for such actions, the reasons given must be within the framework of the United States Constitution. For example, if a probationary employee is discharged because of his race or religion, such action could not be squared with the United States Constitution. The refusal by the New Jersey Supreme Court, as indicated in the opinion of the court by Justice Schettino, to give any credence to petitioner's constitutional rights is in complete opposition to this court's decision in *Vitarelli*, *Nelson* and *Lerner*.

Conclusion.

For the reasons hereinabove stated, this Petition for a Writ of Certiorari to the New Jersey Supreme Court should be granted.

Respectfully submitted,

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APPENDIX A.

Decision of the State Board of Education.

While we agree with the Commissioner's disposition of this appeal, we prefer to base our affirmance somewhat more narrowly. In our view, the problems presented here are rooted in the fact that this petitioner, a nontenure teacher at the time of his original dismissal in 1955, found common legal cause with two tenure teachers for purposes of the litigation culminating in *Laba* v. *Newark Board of Education*, 23 N. J. 364 (1957). An appreciation of the precise reason therefor dispels all confusion.

When the petitioner was discharged by order of the local board on June 23, 1955, he did not have tenure, but only a one-year contract due to expire on June 30, 1955. The order rendered his dismissal effective as of May 20, 1955. At the time of his discharge, as now, N. J. S. A. 18:13-11 provided:

> "When the dismissal of any teacher before the expiration of a contract entered into between the teacher and a board of education shall, upon appeal, be decided to have been *without good cause*, the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether the teacher shall or shall not teach for the unexpired term." (Emphasis added.)

Although the statute appears primarily designed to protect the contractual rights of nontenure teachers, it correlatively empowers local boards to dismiss such teachers for any reason whatever, whether with or without cause, provided only that teachers discharged "without good cause" must be compensated for the full terms of their contracts. Thus the cause of this petitioner's dismissal in 1955 was

then significant only to the issue of whether he was entitled to compensation for the period commencing on May 20, 1955, the effective date of his dismissal, and June 30, 1955, the expiration date of his contract of employment. Under the clear terms of the statute, he had no other grievance on appeal. We have no doubt that if petitioner's appeal from his 1955 dismissal had been heard individually, it would have been decided in that context.

In fact, however, this appeal was heard in conjunction with those of Dr. Lowenstein and Mrs. Laba, teachers who were dismissed at the same time and on the same grounds. Unlike this petitioner, his companions then enjoyed tenure, and therefore could not have been dismissed without "just cause". N. J. S. A. 18:13-17. Notwithstanding this basic distinction in status, all three appeals presented the identical issue of "just cause", or "good cause" and they were therefore heard and decided together. The objective of Zimmerman's appeal, however, necessarily differed from that of his co-appellants. A tenure teacher is entitled to reinstatement upon a showing that his discharge was without "just cause", N. J. S. A. 18:13-17, while a nontenure teacher, upon the same showing, is entitled only to compensation for the unexpired term of his contract of employment. N. J. S. A. 18:13-11. It is clear that both the Commissioner and the Supreme Court were well aware that although the ultimate legal issue raised by Zimmerman's appeal was identical with the question raised by the appeals of his colleagues, Zimmerman was at best entitled to different and limited relief:

> "Both Dr. Lowenstein and Mrs. Laba duly acquired tenure protection under the New Jersey School Laws. See R. S. 18:13-16; R. S. 18:13-17. Mr. Zimmerman * * * had not acquired tenure protection when he was dismissed by the board. However, in view of the terms of R. S. 18:13-11, all of the

parties and the State Commissioner have, *for present purposes,* not differentiated his case from the others." (Emphasis added.)

Laba v. *Newark Board of Education, supra,* 23 N. J. at 370.

On this basis, the Supreme Court in *Laba* affirmed the Commissioner's remand of all three proceedings for further inquiry in consonance with the principles established in the appellate litigation. Notwithstanding the fact that Zimmerman's 1954-1955 contract had long since expired, and of course had not been renewed, the local board in 1957 chose to conduct further investigation and hearings with respect to his fitness to teach in the public school system. Whether such further proceedings were worthwhile in relation to the stakes involved, i. e., five or six weeks' salary, is a matter of local wisdom beyond the range of effective comment on our part. In any event, a preliminary inquiry led to the filing of "supplementary charges" against Zimmerman, which charges in fact constituted entirely new ones pertaining to his conduct after the expiration of his contract of employment. Hearings on these new charges led to an order of the board entered June 24, 1958, which dismissed petitioner effective May 20, 1955. The matter is before us on appeal from the Commissioner's affirmance of this order.

We have said that when petitioner was originally dismissed in 1955, he was not entitled to challenge the dismissal as to cause for the purpose of winning reinstatement. N. J. S. A. 18:13-11. We now find that nothing has since occurred to enlarge his rights in this respect. On this appeal, he argues in effect that the local board, by electing to pursue the inquiry as to him after the *Laba* decision, has conferred some sort of *de facto* tenure upon him. We find the contention specious for the reasons set forth by the Commissioner.

Finally, we agree with the Commissioner that since the petitioner was in fact dismissed on the basis of entirely new charges relating to his conduct after the termination of his contract of employment, he is entitled to the amount of compensation that would have been due him from the effective date of his discharge, May 20, 1955, to the expiration date of his contract of employment, June 30, 1955.

The judgment of the Commissioner is affirmed in all respects.

Dated: December 6, 1961.

APPENDIX B.

Decision of Commissioner of Education November 9, 1960.

For the Appellant, LEVY, LEMKEN & MARGULIES (SEYMOUR MARGULIES, of Counsel).

For the Respondent, JACOB FOX.

This is an appeal by a teacher from an order of the Board of Education of the City of Newark, dated June 24, 1958, which dismissed him from its employ as of May 20, 1955. The applicant prays that the Commissioner direct his reinstatement to his former position as teacher with the Newark Board of Education with back pay from the date of his dismissal.

This case originally came before the Commissioner of Education on an appeal from a dismissal ordered by the Board of Education on June 23, 1955, which was based solely on the proposition that in a Congressional inquiry

into Communism and subversion generally, the applicant had invoked the privilege against self-incrimination in refusing to answer certain questions as to his affiliations and associations, and that such conduct was just cause for his dismissal. Because appellant had not acquired tenure, any dismissal of him would be according to R. S. 18:13-11. However, because two other tenure teachers appealed concurrently to the Commissioner under R. S. 18:13-17, all the parties and the Commissioner at that time did not differentiate appellant's petition from the others. On that appeal the Commissioner reversed the decision of the Newark Board of Education and remanded the case to the Board for further proceedings not inconsistent with the opinion of the United States Supreme Court in *Slochower* v. *Board of Education*, 350 U. S. 551. Subsequently, on an appeal to the New Jersey Supreme Court, the decision of the Commissioner was affirmed. *Laba* v. *Newark Board of Education*, 23 N. J. 364, 394.

On the remand to the local Board, the matter was referred to its Superintendent of Schools for further inquiry consonant with the decision of the Supreme Court. Under date of May 10, 1957, the Superintendent, by letter, requested appellant to appear in his office on May 16, 1957, for an interview relating to his fitness to teach in the public schools. The following is an excerpt from the letter:

> "At the interview you will be afforded the opportunity to respond frankly and full to questions pertinent to the matters discussed in a recent decision of the New Jersey Supreme Court in connection with the remand of appeal relating to your previous dismissal by the Newark Board of Education. The sole purpose of the interview is to determine the truth in terms of frank and full disclosures without equivocation or mental reservation."

Appendix B—Decision of Commissioner of Education November 9, 1960.

The interview was held on May 16, 1957. After appellant explained that he had invoked his privilege against self-incrimination before the House subcommittee under the Fifth Amendment on the advice of counsel, the Superintendent did not pursue this subject any further. He was, however, not satisfied with appellant's responses to other questions. As a result the Superintendent, on October 22, 1957, filed supplementary charges with the Board relating to appellant's continued fitness to teach. The charges were based on appellant's alleged failure to fulfill his duty of cooperation with the Superintendent with respect to the inquiry into his fitness to teach in that he failed to give frank and full disclosures as to past association with the Communist Party and affiliated organizations and that many of his responses were incredible, indirect, or otherwise inadequate from the standpoint of forthrightness.

The Board of Education held hearings on these charges in November and December, 1957. It decided that the whole truth as to the appellant's past affiliation with and his reported withdrawal from the Communist Party was not disclosed by him; that facts called for by pertinent questions were withheld by him; and that the Superintendent and the Board were not accorded the cooperation they were entitled to have from him in their inquiry. The Board drew no inference as to present affiliation with or subservience to the Communist Party but held that the record amply revealed that appellant, at the Superintendent's interview, obstructed a bona fide inquiry into the truth of whether or not he is now a member of the Communist Party or subject to its ideologies and discipline. Accordingly, his dismissal was ordered as of May 20, 1955, the effective date of the original dismissal:

> "The adoption of this resolution is not intended to constitute an acknowledgment that Mr. Zimmer-

> man had any employment or tenure status with the Board, and shall not be deemed to extend to him any status, for any period beyond the 1954-1955 school year, when the period of his probationary employment expired."

It should also be pointed out that a similar statement was contained in the resolution of September 24, 1957, ordering further proceedings against appellant.

The Commissioner will decide first whether the dismissal may be sustained as of May 20, 1955. The Supreme Court, in the case of *Lowenstein* v. *Board of Education of Newark*, 33 N. J. 277, said that after the teacher told the Superintendent he had claimed the privilege against self-incrimination before the subcommittee on the advice of counsel and that subject was quite properly not pursued further, the matter of contumacious or frivolous refusal to answer as a basis for disciplinary action was thereby permanently removed from the case and nothing remained with respect to the original charges. While no special point was made of it before the Court, it was said in the decision that the motion should have been granted since no basis remained to support a claim of any improper conduct before the subcommittee.

The Court also said that the "supplementary" charges preferred by the Superintendent after the interview were actually new ones. The Commissioner took a similar view in his decision on the same case (*Lowenstein* v. *Board of Education of the City of Newark*, decided June 1, 1959). In this decision the Commissioner said:

> "The proceedings by the superintendent and the board of education on the remand were not addressed to his conduct before the House Sub-Committee, but rather to his past activities and associations as these

> might bear upon subjection to the ideologies and disciplines of the Communist Party. It was in an inquiry on the latter subject that the appellant exhibited his lack of candor which led the respondent board to conclude that he was unfit to remain a teacher in its schools. Our Supreme Court has already held that petitioner's conduct before the House Sub-Committee was not *per se* just cause for dismissal and no further evidence has been presented to prove that his conduct before the House Sub-Committee was unbecoming that of a teacher."

The Commissioner held that the dismissal should not revert to a time prior to the acts justifying it, that the applicant, therefore, should be dismissed effective May 16, 1957, and, furthermore, that the appellant should be paid by the respondent board of education the salary which became due him between May 20, 1955 and May 16, 1957. More recently, the Commissioner, on October 24, 1960, in the latest appeal of Dr. Lowenstein, reaffirmed this decision as to the effective date of dismissal. *Lowenstein* v. *Newark Board of Education,* decided October 24, 1960.

The factual situation in the instant case is similar and, therefore, the Commissioner's decision in the *Lowenstein* case, that the dismissal should not revert to a time prior to the acts justifying it, is controlling here. The Commissioner holds that the Board erred in dismissing appellant as of May 20, 1955, and that he is entitled to salary which came due between May 20, 1955, and the end of his employment in June, 1955.

With regard to appellant's prayer that he be reinstated in his position as teacher, the Commissioner is without power to give the relief requested. Appellant had not acquired tenure of position in the Newark schools. His em-

ployment, dating from September 1, 1952, was on academic year basis. He needed employment in the academic year 1955-1956 in order to acquire tenure. The Board did not re-employ him after the expiration of his three-year period of probationary employment on June 30, 1955, and he, therefore, failed to acquire tenure and his employment rights ceased as of that date. At the expiration of his probationary employment, appellant lost the protection afforded by N. J. S. A. 18:13-11 and had not acquired the protection of N. J. S. A. 18:13-17. The courts have refused to review the dismissal of non-tenured teachers and have limited their determination to the sole question of whether or not the teacher in fact had tenure status. *Chalmers* v. *State Board,* 11 N. J. Misc. 781; *Gordon* v. *State Board of Education,* 132 N. J. L. 356; *Schultz* v. *State Board of Education,* 132 N. J. L. 345; *Moresh* v. *Board of Education of Bayonne,* 52 N. J. Super. 105. The statutes (N. J. S. A. 18:6-20, 18:13-5) clearly place the responsibility with the board of education to determine whether or not teachers should be employed or re-employed during the probationary period provided by law. The Commissioner has never attempted to substitute his judgment for that of the board of education in determining whether a non-tenure teacher should be re-employed. For this reason and for the further reason that he is without power to order the re-employment of appellant, the Commissioner will express no opinion on the merits of the case.

Appellant contends that notwithstanding the fact that tenure had not accrued, justice would require that he be reinstated to his position if the charges of the Board were not sustained on this appeal. The testimony of appellant's principal discloses that he had rated him "satisfactory". Usually tenure would have come automatically following such a rating. The principal appended the following statement to his rating:

Appendix B—Decision of Commissioner of Education November 9, 1960.

"This record concerns work at Dayton. Permanent appointment should be deferred until results of trial on June 21st."

In oral argument, counsel for appellant maintained that the Commissioner has the power to reinstate him because the statutes give him complete superintendence over the school system. Appellant also, in his brief, argues that the proceedings before the Superintendent occurring after the expiration of his probationary employment, imply a relationship of teacher and superintendent. Absent the teacher-superintendent relationship on May 16, 1957, the reasons, it would be impossible to predicate charges on supplement the original charges because if appellant was not a teacher as of May 16, 1957, he was under no obligation to appear to speak. If there had been no teacher board of education-superintendent relationship existing, the whole matter, in so far as appellant is concerned, would have been moot and the time of the court wasted. Having prosecuted appellant on the basis of a teacher relationship, the Board is now estopped from denying the existence of that relationship, he claims.

Respondent argues that if the suspension of a non-tenure employee causes his employment to continue after the period of employment under his appointment ends, then an employee might acquire, during litigation, a right to permanent status which he did not have when the litigation began. Appellant never had any appointment from the Board for any period after the end of the 1954-1955 academic year. Respondent further points out that charges were preferred against appellant in the first instance and formal hearings held thereon, not because appellant was under tenure, but because he had been appointed for the 1954-1955 academic year and therefore could not be dis-

missed before June 30, 1955 "without good cause". (N. J. S. A. 18:13-11). The procedure for charges and hearing is not defined by statute in the case of teachers under contract and the Board, therefore, employed the procedures defined in N. J. S. A. 18:13-17 and 18 for tenure teachers. This, respondent contends, was the only proper course to pursue as there could be no justification for according less procedural safeguards for a teacher under contract than those prescribed for a teacher under tenure.

Respondent further argues that the principle of estoppel is nowhere present because appellant had no tenure which the Board could be estopped to deny. Reference is made to the statements in the brief filed by the Board with the Supreme Court, the resolution for further proceedings, and the resolution of dismissal in each of which the Board specifically disclaimed any tenure rights of appellant. Respondent also cites the decision of the Supreme Court, in the *Laba* case, *supra*, where it was said:

> "Mr. Zimmerman began teaching in the public school system in 1952 and had not acquired tenure protection when he was dismissed by the Board. However, in view of the terms of R. S. 18:13-11, all of the parties and the State Commissioner have, for present purposes, not differentiated this case from the others."

New Jersey Statutes Annotated, 18:3-7 reads as follows:

> "The Commissioner shall be the secretary of the state board. He shall enforce all rules and regulations prescribed by the state board. He shall have supervision of all schools of the state receiving any part of the state appropriation."

Appellant considers the power of the Commissioner under this statute adequate to redress any alleged injustice which might be done to him by reason of the fact that his suspension prevented his fulfilling the conditions prerequisite to the acquisition of tenure pursuant to N. J. S. A. 18:13-16. The Commissioner does not agree. The power granted to him under N. J. S. A. 18:3-7 is general. The conditions for acquiring tenure under N. J. S. A. 18:13-16 are specific. It was held in the case of *Ahrensfield v. State Board of Education*, 126 N. J. L. 543, that one does not gain the protection of tenure procedures upon dismissal until he has fulfilled the precise conditions of the tenure statute. The rule is that where there is any conflict between a general and specific statute covering a subject in a more minute and definite way, the latter will prevail over the former and will be considered an exception to the general statute. *Ackley* v. *Norcross, et al.*, 122 N. J. L. 569, affirmed 124 N. J. L. 1933. Even if a very broad interpretation were to be given to the Commissioner's powers under 18:3-7, they could not be extended to the area of tenure because there is specific legislation on this subject. If injustice occurs to a teacher because litigation interrupts the continuity of the employment essential to the acquisition of tenure, the remedy must lie with the Legislature.

The Commissioner does not subscribe to the theory that there was an implied teacher-school board-superintendent relationship because of the litigation after the expiration of the academic year 1954-1955. N. J. S. A. 18:6-20 provides that no teacher shall be appointed except by a majority vote of the whole number of members of the Board. N. J. S. A. 18:13-5.7 makes further provisions concerning the employment of teachers. In *McCurdy* v. *Matawan*, 1938 S. L. D. 298, the question was whether employment was valid if the appointee did not receive a majority of the

whole membership of the Board of Education as required by law. The Commissioner held at p. 299 that full compliance with the statutory requirements as to the formalities of employment is essential to the validity of such employment. In *LaRose* v. *Board of Education of Egg Harbor City*, 1938 S. L. D. 377, at p. 388, the Commissioner said:

> "It is probable that the Legislature, in making conditions essential to legal contracts between boards of education and teachers, had in mind many boards of education whose contractual experience might be limited and it desired to protect such boards from incurring legal obligations except in formal contracts or under rules of employment which they definitely adopt."

There is no record nor claim that appellant was appointed by a majority vote of the whole number of members of the Board or that any other formalities of employment occurred for any period of employment after June, 1955. Hence, appellant did not fulfill the conditions for tenure according to N. J. S. A. 18:13-16 and, therefore, he has no claim to tenure. The Commissioner has already decided that he cannot confer tenure by his general powers of supervision and he has also explained that he makes no determinations concerning the employment or re-employment of teachers not protected by tenure. Therefore, the Commissioner can give no relief to appellant beyond ordering the payment of the salary due him between May 20, 1955, and the end of the academic year in June 1955. Having reached this conclusion, there is no necessity for considering and deciding other issues raised in this appeal.

The Board of Education of the City of Newark is directed to pay Perry Zimmerman, appellant herein, the amount of salary which would have been due to him from

the date of his suspension, May 20, 1955, to the termination of his employment, June 30, 1955. The petition is in all other respects dismissed.

COMMISSIONER OF EDUCATION.

November 9, 1960.